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No. 95-1614

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

WESTLAND DEVELOPMENT COMPANY, INC., A NEW MEXICO CORPORATION,

Petitioner,

vs.

CITY OF ALBUQUERQUE, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the New Mexico Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT I. WALDMAN
Counsel of Record
EDWARD R. PEARSON
ROBERT M. WHITE
Attorneys for Respondent
P.O. Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500

8802
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

16 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does payment of just compensation required by the Fifth Amendment to the United States Constitution include payment to one whose property is partially taken for damages to the condemnee's remaining property resulting from the use of adjoining land previously owned by the condemnor?

2. Should this Court review its holding in *Campbell v. United States*, 226 U.S. 368 (1924), which was followed by the New Mexico Court of Appeals in this case, which held that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken by public use, does not include the diminution in value of the owner's remaining land caused by the acquisition and use of adjoining lands of others for the same undertaking?

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STATEMENT OF THE CASE

On December 13, 1989, the City of Albuquerque ("City") filed this eminent domain lawsuit to acquire 22.788 acres out of Westland Development Co., Inc.'s ("Westland") 14,977.21 acre parcel for a 60 foot right-of-way upon which to construct a road ("Access Road") connecting the frontage road south of Interstate 40 ("Frontage Road") and the City's Cerro Colorado landfill (the "Landfill"), located just west of Westland's property. The land upon which the Landfill was built was acquired by the City in a property exchange with the U.S. Forest Service and Albuquerque Academy in 1984 for property in the Sandia Mountains. The previously existing Frontage Road was public right of way which was paved and improved by the City. No property was taken from Westland by the City in this eminent domain action for either the Frontage Road or the Landfill. A diagram showing the location of the Access Road taken by this action and also the location of the Frontage Road and the Landfill are included in the Court of Appeals opinion (Petitioner's Appendix, p. 3) and the Petition (p. 4). Although there was no previous public access road to the Landfill, the Court of Appeals recognized that the City could have acquired access to the Landfill from the north or west on land not owned by Westland.

At pretrial motions, the trial judge ruled and at trial instructed the jury that Westland was entitled to damages for the value of the property taken for the Access Road right-of-way and for the reduction in the value of Westland's remaining property resulting from the use of the Access Road for garbage truck traffic. Westland contended at trial and on appeal that it is entitled to recover damages to the uncondemned portion of its property caused by the entire project, including the Landfill itself and the increased traffic on the improved Frontage Road, and is not limited to damages caused by the Access Road

constructed on land taken by this eminent domain proceeding and the resulting use by garbage trucks. The New Mexico Court of Appeals affirmed the trial court, holding that damages from the proximity of Westland's remaining property to the Landfill and from increased traffic on the previously existing Frontage Road are not compensable. The New Mexico Supreme Court denied Westland's Petition for Writ of Certiorari to that Court. Although other issues were raised in the Court of Appeals, this is the sole issue raised in Westland's Petition to this Court for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE NEW MEXICO COURT OF APPEALS FOLLOWED THE STANDARDS ESTABLISHED BY THIS COURT IN THE *CAMPBELL* OPINION.

The United States Supreme Court has ruled on the issue involved in this case in *Campbell v. United States*, 266 U.S. 368 (1924). The facts in the *Campbell* are very similar to this case. In *Campbell*, the United States took possession of a 1,300 acre tract from several landowners to build a munitions plant during World War I. The government condemned 1.81 acres of the Campbell's property for the project. The District Court awarded damages to Campbell for the value of the land taken and also damage to Campbell's remaining property due to the land taken, the same as the District Court in this case. Campbell also sought damages for his remaining property due to the munitions plant built on the neighboring property acquired from others, as Westland seeks damages due to the Landfill on adjoining property already owned by the City. The United States Supreme Court limited consideration of damages to the owner's remaining property only to the taking and use of the condemned property, and gave

no compensation for damages due to the munitions plant built on adjoining land acquired from others. Following the *Campbell* opinion, the trial court allowed the jury to consider damages to Westland's remaining property due to the property taken by the condemnation for the Access Road and resulting use by garbage trucks. The trial court disallowed damages resulting from the project, none of which was built on land taken from Westland, for the improvements to the Frontage Road and Landfill. Affirming the trial court, the New Mexico Court of Appeals followed *Campbell*, disallowing damages due to the Landfill and Frontage Road, as the United States Supreme Court in *Campbell* disallowed damages due to the munitions plant built on adjoining land. The New Mexico Court of Appeals quoted from *Campbell* in its holding (Petitioner's Appendix, p. 10):

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. . . .

266 U.S. at 372.

II.

THE REASONING OF THE *CAMPBELL* CASE IS CLEAR AND IS THE STANDARD FOLLOWED IN MOST JURISDICTIONS.

Westland asserts that the rule of law established by this Court in the *Campbell* decision and followed by the District Court and the New Mexico Court of Appeals in this case should

be reviewed and changed. Petitioner initially argues that the reasoning of *Campbell* is unclear. The New Mexico Court of Appeals quoted the following language from the *Campbell* opinion (Petitioner's Appendix, p. 10 and 11).

> The land taken from plaintiff was not shown to be indispensable to the construction of the nitrate plant or to the proposed use of the other lands acquired by the Untied States. The damages resulting to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others. The proposed use of the lands taken from others did not constitute a taking of his property. Plaintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. It is only because of the taking of a part of his land that be became entitled to any damages resulting to the rest. In the absence of a taking the provision of the Fifth Amendment giving just compensation does not apply; and there is no statute applicable in this case that enlarges the constitutional right. If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by

> the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the United States is not greater than would be that of the private users.

(*Id.* at 372).

The New Mexico Court of Appeals found nothing ambiguous in the reasoning of *Campbell* and applying the *Campbell* reasoning to this case stated: (Petitioner's Appendix. p. 12)

> Under the *Campbell* rule Westland is not entitled to compensation for any reduction in the value of the uncondemned portion of its parcel resulting from the increased use of the frontage road or the proximity of the landfill, because the frontage road and the landfill are not on land acquired from Westland by condemnation. Moreover, the logic underlying the *Campbell* rule supports the denial of such compensation in this case. An owner's property right to land does not encompass the right to control the use of land owned by others. Only in the exceptional case is a property owner entitled to damages or injunctive relief because of a reduction in the value of land caused by activity on a neighbor's land. *See Scott v. Jordan*, 99 N.M. 567, 661 P.2d 59 (Ct. App. 1983). In other words, the neighbor's activity, even though it may reduce the value of the owner's land, ordinarily violates no property right of the owner. But if the activity violates no property

> right of the owner, then the government owes the owner no compensation for engaging in the activity. See *Aguayo v. Village of Chama*, 79 N.M. 729, 449 P.2d 331 (1969) (discussing when damages are recoverable because of nearby public sewage disposal plant).

The New Mexico Court of Appeals correctly applied the clear and unambiguous rule and reasoning in the *Campbell* case to the facts of this case.

Westland further argues that this Court should reconsider the *Campbell* decision because the law on the issue is in turmoil because some courts have created an exception. As recognized by the Court of Appeals and Petitioner, the Ninth Circuit has created an exception to the strict rule of *Campbell* and has allowed consideration of the effect of the use of adjoining or the landowner's remaining property if the following requirements were met: *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961); *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982) *cert. denied*, 460 U.S. 1041 (1983).

1) the land taken from the condemnee was indispensable to the project,

2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project, and

3) damages from the land taken and from the land not taken were inseparable.

Petitioner cites several state cases which have recognized this three part exception. Other state courts have found a one part exception if the property taken constitutes an integral and

inseparable use to which the land taken and other adjoining land is put. *Andrews v. Cox* 29 A.2d 587 (Conn. 1942).

The New Mexico Court of Appeals, after recognizing the exceptions, followed the rule in *Campbell* (Petitioner's Appendix, p. 12):

> Most jurisdictions that have considered the matter apply the *Campbell* rule. See, e.g., *8,960 Square Feet, More or Less v. State, Dep't of Transp. & Pub. Facilities*, 806 P.2d 843, 846 (Alaska 1991); *Utah Dep't of Transp. V. D'Ambrosio*, 743 P.2d 1220 (Utah 1987). See generally Annotation, Compensation for Diminution in Value of the Remainder of Property Resulting from Taking or Use of Adjoining Land of Others for the Same Undertaking, 59 A.L.R.3d 488 (1974).

The *Campbell* case established a bright line rule. The fact that some courts have recognized a qualification of the rule does not mean that the standard established by the highest court should be abandoned or need clarification, as asserted by Westland.

The Court of Appeals looked to cases from other jurisdictions which had similar facts. These cases followed the standard established in *Campbell*. The Court of Appeals cited *Griffith v. Montgomery County*, 470 A.2d 840 (Md. Ct. Spec. App.), *cert. denied*, 479 A.2d 373 (Md. 1984), *and cert. denied*, 469 U.S. 1191 (1985), a case with nearly identical facts, in which the Court held that landowners were not entitled to damages to their remaining land from an adjoining Landfill even though a portion of the landowner's land was condemned to construct a

road to the Landfill. The Court of Appeals also cited *City of Crookston v. Erickson*, 69 N.W.2d 909 (Minn. 1955), which denied compensation for proximity to a sewage disposal plant to a landowner whose property was taken for a sewer pipe leading from a river to the plant.

III.

WESTLAND DOES NOT FIT INTO ANY OF THE *CAMPBELL* RULE EXCEPTIONS.

In addition to applying the legal standards of *Campbell* to the facts of this case, the New Mexico Court of Appeals also analyzed the facts in this case against the legal standards in the exceptions that Westland asserts should have been applied. The Court of Appeals concluded (Petitioner's Appendix, p. 16), "But these seemingly more generous standards provide little comfort for Westland."

Even if this Court were to apply the recognized exceptions in this case, Westland still would not be able to prevail. The Court of Appeals held that Westland failed to meet the separability of damages requirement of the three part test. The Court of Appeals found that there was no practical problem distinguishing damages from the property taken and the use of property not taken in the condemnation. Westland criticizes the Court of Appeals' statement that damages were severable simply because the trial judge had no difficulty admitting evidence on damages from the Access Road and excluding evidence of damages caused by the adjoining Landfill and increased traffic on the Frontage Road. However the court's ruling was due in part to the Westland's own testimony that the damages were separable. Westland's own appraiser testified that damages to Westland's remaining property due to the Access Road resulted from the property within 1,000 feet of either side of the new Access Road

no longer having any contributory value to the entire parcel because of the garbage truck traffic. In Westland's appraiser's report, which was tendered as an offer of proof, their appraiser found damages from the Landfill and the Access Road devalued all of the property between the Access Road and the Landfill, and that to compensate Westland for damages from the increased traffic on the Frontage Road, Westland should be paid the cost of a substitute road to functionally replace the Frontage Road.

Westland faced no dilemma it claims in its Petition. Westland's own appraiser had no difficulty separating the damages. He testified as to damages from the Access Road and garbage trucks at trial, and submitted evidence of damages from the Landfill and Frontage Road by offer of proof.

The Court of Appeals used the *City of Crookston* case to illustrate the reason that Westland did not fit into the one part integral and inseparable part of the project exception recognized in that case, in which the landowner was denied damages from the proximity to a sewage treatment plant because a portion of their property was condemned for a sewer line to the plant. Citing *Crookston*, the Court of Appeals stated (Petitioner's Appendix, p 17-18):

> The court held "as a matter of law, the use of the land taken on tract C does not constitute an integral and inseparable part of the sewage disposal plant project and therefore any depreciation in the market value of tract C resulting from the mere proximity of the disposal plant and the contemplated user thereof is not recoverable." Id. We see no principled distinction between the right of way for the pipe to the sewage plant and the right of way for the access road to the landfill.

> Just as the pipe is separable (in terms of measurement of damages) from the sewage plant, the access road is separable from the landfill. Also, in our view, as previously stated, damages caused by increased traffic on the frontage road are equally separable from damages caused by use of the access road.

A case qualifying for the one part "integral and inseparable part" test was illustrated by the Court as *Andrews v. Cox*, 29 A.2d 587 (Conn 1942), in which a road embankment constructed as part of a highway project which obstructed the view from the landowner's property was considered an integral and inseparable part of a single use which reduced the market value of the landowner's remaining property. A roadway to the Landfill, as a sewer line to a treatment plant, is not integral and inseparable as a roadway is to an embankment upon which it is built.

IV.

THIS CASE DOES NOT QUALIFY FOR REVIEW UPON WRIT OF CERTIORARI UNDER ANY OF THE GENERAL STANDARDS LISTED IN RULE 10.

Considerations for review on certiorari by this Court are specified in Rule 10. The City recognizes that these considerations are not exclusive. The Court of Appeals' decision does not qualify under Rule 10(b) as conflicting with the decisions of the United States Court of Appeals or another state court of last resort. The Court of Appeals followed the *Campbell* decision of this Court and the majority of other courts. While considering the exceptions to *Campbell* created by some courts, the New Mexico Court of Appeals held that under the facts of this case Westland did not qualify under the exceptions.

Westland further does not qualify under Rule 10(c), that an important federal question has not been, but should be, settled by this Court or that the state court decision conflicts with relevant decisions of this Court. This Court established the standard in the *Campbell* case that a landowner is not entitled to damages to their property resulting from the uses made of adjoining property. The trial court and New Mexico Court of Appeals in this case followed this long standing standard exactly. Westland simply wants this rule changed because the rule established in *Campbell* denies Westland the compensation it seeks in this case.

CONCLUSION

The trial court correctly followed the rule in the *Campbell* case established by this Court in 1924. The New Mexico Court of Appeals affirmed, and the Supreme Court of New Mexico denied certiorari. Even if this Court reversed and adopted one of the exceptions, the Court of Appeals has already ruled that Westland does not fit into any of the exceptions so that the result would be the same.

Westland argues that *Campbell* is an old case and should be reviewed. However, as quoted by the New Mexico Court of Appeals, this Court quoted from *Campbell* in the recent case of *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992) (Petitioner's Appendix, p. 13):

> If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the

> United States is not greater than would be that of the private users.

266 U.S. at 371-2.

The New Mexico Court of Appeals correctly followed *Campbell*. There is no compelling reason for this Court to review the *Campbell* decision. Westland's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT I. WALDMAN
Counsel of Record
EDWARD R. PEARSON
ROBERT M. WHITE
Attorneys for Respondent
P. O. Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500